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No. 482.

In the

Supreme Court of the United States

October Term, 1915.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Plaintiff in Error

vs.

MRS. NORA M. JONES, Administratrix.

MOTION TO DISMISS.

Counsel for the Appellee, Mrs. Nora M. Jones, Administratrix.

In the

Supreme Court of the United States

October Term, 1915.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

MRS. NORA M. JONES, Administratrix.

No. 492.

MOTION TO DISMISS.

Comes now the appellee herein, by Newton C. Blanchard, Leon R. Smith and Otis W. Bullock, her counsel, appearing in that behalf, and move the Court to dismiss the writ of error in the above entitled cause, or affirm the judgment of the court below, for the following reasons, to-wit:

Assignment of Error No. 1:

> "The court erred in holding that while evidence of contributory negligence on the part of the deceased was admissible to mitigate the amount of the damages to be

awarded by the jury, under the Act of Congress known as the Employers' Liability Act, that yet in order that such evidence might be admitted that it should be offered for that specific purpose and not tendered generally, contrary to said Act of Congress."

On the trial of this cause the fireman on the passenger train, Elmer Wood, was asked by counsel for plaintiff in error this question:

"Q. You did not have the train under control then?

Counsel for plaintiff objects to any evidence as to contributory negligence as the same is not alleged.

Objection sustained by the court.

To which ruling of the court counsel for defendant excepts and asks that this note stand in lieu of a formal bill of exceptions." (Tr. 25.)

The ruling of the trial judge is made the basis for the first three assignments of error. (Tr. 63.)

The Supreme Court of Louisiana in the instant case upheld the ruling of the trial judge, saying:

"The evidence was therefore offered in support of the defense set up in the pleading, and, so far as the record shows, with no restriction as to its intended effect, and, as so offered, was properly excluded."

We submit when the offer of testimony includes that which is admissible with that which is not,

and the competent and incompetent are blended together, it is not the duty of the court to separate the legal from the illegal, but the whole may be rejected when objection is made.

Further, we contend that averments of a Federal question to give jurisdiction to the Honorable Supreme Court of the United States must be so distinct and positive as to place it beyond question that the party bringing the case up upon a writ of error from the state court intended to assert a Federal right.

It is, we contend, essential that the record should disclose, not only that the alleged right, privilege or immunity was specially set up and claimed in the court below, but that the decision of that court was against the right so set up or claimed.

The bill of exceptions reserved by the plaintiff in error to the ruling of the trial judge did not contain any reference whatever to the Employers' Liability Act.

Assignment of Error No. 2:

> "The court erred in excluding evidence of the contributory negligence of the deceased tendered by the defendant, because it was not admissible generally, under the Act of Congress known as the Employers' Liability Act, and when offered was not restricted by defendant then and there for the purpose of mitigating the amount of damages to be awarded, contrary to said Act of Congress."

We submit that the established rule of the Federal courts is that contributory negligence to defeat recovery or to reduce recovery must directly and proximately contribute to the injury.

In the instant case the Supreme Court of Loiusiana said:

> "In this case, however, it cannot be seriously contended that the engineer on the passenger train could have avoided the collision, or that there was any negligence whatever on his part. The fireman testified, and it was not contradicted, that the train had slowed down and was under control."

We submit the Supreme Court of the United States upon a writ of error will not make inquiry whether there was error below in dealing with questions of fact.

With the findings upon the facts by the Supreme Court of Louisiana being final, it is apparent that the plaintiff in error could not have been prejudiced by the ruling of the trial judge, for the facts show there was no negligence on the part of the engineer, T. A. Jones, deceased, and in consequence the basis for the first three assignments of error by the plaintiff in error must fall.

We submit that the Honorable Supreme Court of the United States will learn from reading the opinion of the Louisiana Supreme Court, that

the Federal Safety Appliance Act was violated by the plaintiff in error (Railroad), and therefor the plea of contributory negligence was not available to it as a defense.

Assignment of Error No. 3:

> "The court erred in excluding evidence of the contributory negligence of the deceased which it held was admissible for the purpose of mitigating the damages to be awarded by holding that it must be restricted to that purpose and so tendered by the defendant, for the reason that under the Employers' Liability Act of Congress such evidence is admissible to mitigate the damages to be awarded and being so admissible it was the duty of the trial judge to instruct the jury that it should be considered by them in fixing the amount of damages to be awarded and should not be considered in determining the liability of the defendant, and it was not the duty of defendant under said Act of Congress to specifically limit the purpose or effect of such evidence at the time it was tendered, such limitation being fixed in the Act itself."

This assignment of error cannot be considered for there is no bill of exceptions in the record, complaining of the charge of the law made by the trial judge to the jury.

Errors committed by the trial judge, we submit, should be brought to his attention before the

retirement of the jury, so as to enable the judge to correct such error, if there be any.

Under the law of Louisiana the defense of contributory negligence, to be available, must be specially pleaded.

We submit that errors assigned upon the record, relating to matters of pleading and practice under the laws of the state, involve no Federal question.

Assignment of Error No. 4:

> "The court erred in denying to the defendant the right to remove said cause to the United States District Court for the Western District of Louisiana, for the reason that said suit was of a civil nature wholly between citizens of different states and involved, exclusive of interest and cost more than three thousand dollars, the right of removal being given to the defendant because of such diverse citizenship by the Constitution and laws of the United States and particularly by Section 2 of Act of Congress of March 3d, 1887, and the amendments thereto."

We submit that the issue here raised has been foreclosed by a recent decision of the Honorable Supreme Court of the United States, *viz., Kansas City Southern Railway Company, Plaintiff in Error,* v. *Sam E. Leslie, Admr.* (not yet reported). The court denied the right to remove,

under a state of facts in every way similar to those of the instant case.

Assignment of Error No. 5:

> "The court erred in awarding damages to the administratrix of the deceased without taking into consideration the elements for which damages are awarded under the Act of Congress, known as the Employers' Liability Act, approving and awarding her a sum in excess of that which it had allowed to others where the elements of recovery embraced not only loss of support as sued for in this case, but where the elements of recovery also embraced mental anguish, and a recovery for the death of the deceased, and the Supreme Court of the State of Louisiana by failing to give consideration to the elements of damages recoverable under said Act of Congress and by awarding a lump sum to each of the beneficiaries under said Act, dodged the Federal question thus presented and decided the same adversely to defendant, contrary to the terms and provisions of said Act of Congress, approved April 22d, 1908, amended April 5th, 1910."

This contention is wholly without merit, we submit, for there is no bill of exceptions in the record, nor is the charge of the trial judge reproduced in the record upon which to base such a contention.

The verdict of the jury approved by the trial judge is shown to have been rendered by the jury with discrimination, and upon its face it conforms

to the law apportioning the damages to the beneficiaries as laid down in decisions of the Honorable Supreme Court of the United States.

The *quantum* of damages awarded by verdicts in actions under the Employers' Liability Act does not present a question reviewable by the Honorable Supreme Court of the United States upon a writ of error.

The Supreme Court of Louisiana did not fix the award of damages in the instant case. The jury made the award and the Louisiana Supreme Court in reviewing the case permitted the verdict to stand, for it is the settled jurisprudence of Louisiana that the *quantum* of damages awarded by a jury in a case of personal injury will not be disturbed unless the award is manifestly excessive or inadequate.

The plaintiff in error asserts that the Louisiana Supreme Court failed to take into consideration the Employers' Liability Act in approving and awarding damages. That the award embraced not only the elements of loss of support, but the elements of mental anguish.

The exact reverse of this statement is true, for the Louisiana Supreme Court in its opinion refusing a rehearing said:

> "* * * the present judgment, being governed by the Federal statute, allows nothing for any suffering of the deceased, or for the mental anguish of the plaintiff, and

though it includes nothing in the way of punitory damages."

And the said appellee, by counsel as aforesaid, also move the Court to affirm said judgment or decree from which the said writ of error purports to have been taken, because, although the record in the said cause may show that this Court has jurisdiction in the premises, yet it is manifest that the said writ of error was taken for delay only.

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Counsel for the Appellee, Mrs. Nora M. Jones, Administratrix.

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Plaintiff in Error,

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MRS. NORA M. JONES, Administratrix of the Succession of T. A. Jones, Deceased.

In Error to the Supreme Court of the State of Louisiana.

BRIEF OF COUNSEL FOR APPELLEE, AND DEFENDANT IN ERROR, MRS. NORA M. JONES, ADMINISTRATRIX.

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INDEX.

PAGE

Assignment of Error No. 1..... 2
Discussion and Authorities 2-11
Assignment of Error No. 2..... 11
Discussion and Authorities.....11-14
"Safety Appliance Act" violated by movement of car with defective brakes and coupler. 14-20
Assignment of Error No. 3..... 20
Discussion and Authorities.....21-30
Law of Louisiana 30-32
Great weight of opinion supports rule that defense of contributory negligence, to be available, must be pleaded.....32-34
Assignment of Error No. 4..... 34
Discussion and Authorities.....35-36
Assignment of Error No. 5..... 37
Discussion and Authorities 37-40

CASES CITED.

Adams v. Southern Ry. Co., (Ala.) 50 So. Rep. 987 10-11
3 Bailey, Personal Injuries, 2d Ed., Sec. 851 29
Behn M. & Co. v. Campbell, 205 U. S. 403. 12
Brinkmeier v. Missouri P. R. Co., 224 U. S. 268 25
Buechner v. City of New Orleans, 112 La. 599 31-32
Buena Vista County v. Iowa Falls, etc., R. R. Co., 112 U. S. 165 25
Benson v. United States, 146 U. S. 325.... 7
Canadian Pac. Ry. Co. v. Clark, 73 Fed. 81, C. C. A. 447.....28-29
Central P. R. Co. v. California, 162 U. S. 91. 26
Citizens Sav. Bank v. Owensberg, 173 U. S. 636 6

PAGE

City of Terre Haute v. Hudnut, 112 Ind. 542. 9
Clark v. Canadian Pac. Ry. Co., 69 Fed. 543. 28
Clark v. Commonwealth of Penn., 128 U. S. 395 6
Clark v. Ryan, (Ala.) 11 So. 22. . . . . 8, 10
Cole v. Horton, (Tex.) 61 S. W. 503. 9
Coney Island v. Denman, 149 Fed. 687, 693, 79 C. C. A. 375. 27
Covington v. Roberson, 111 La. 338. 3
Cuthrell v. Cuthrell, 101 Ind. 375. 9
29 Cyc. 580-581. 33
De Atley v. C. & O. Ry. Co., 201 Fed. 591 36
Doe v. Watson, (8 How.) 12 Law Ed. 1076 22
Evans v. Lake Erie & W. R. Co., 78 Fed. 782. 28
Farleigh v. Kelley, 28 Mont. 421, 63 L. R. A. 325 7-8
Federal Employers' Liability Act. 17
Federal Safety Appliance Act. 17-18
F. G. Oxley State Co. v. Butler County, 166 U. S. 648 5
First Nat. Bk. v. North, (S. D.) 51 N. W. 96. . . . . 8, 9
Grand Rapides & I. R. Co. v. Butler, 159 U. S. 87. 26
Gulf, C. & St. F. R. Co. v. McGinnis, 228 U. S. 176 38
Hanna v. Maas, 122 U. S. 24. 21
Hart v. Brierley, 189 Mass. 598. 8
Hamburg v. St. Paul F. & M. Ins. Co., 68 Minn. 335 8
Hickory v. United States, 151 U. S. 303. . . . 21-22
Howard v. Vaughan-Moning Shoe Co., 82 Mo. App. 405. 8

PAGE

Hulac v. C. & N. W. Ry., 194 Fed. 747.... 36
Hurlbut v. Hall, (Neb.) 58 N. W. 538..... 10
Illinois Cent. R. Co. v. Porter, 207 F. 316. 26
Indianapolis & St. L. R. R. Co. v. Horst, 93 U S. 291 34
Int. Harvester Co. v. McKeever, 109 N. W. 642 10
Jacobi v. Alabama, 187 U. S. 133..... 5
Jeffersonville, M. & I. R. Co. v. Riley, 39 Ind. 568 8
Johnson v. Drew, 171 U. S. 93..... 26
Jones Com. on Ev..... 4
Jones v. Kansas City Southern Ry. Co., 137 La. —. 23
Kansas City Southern Railway Company v. Sam E. Leslie, Adm'r., (not yet reported). 36
Kelley's Adm'r. v. C. & O. Ry., 201 Fed. 602. 36
Labatt on Master & Servant, Vol. 4, Sec. 1636. . . ..29, 32
Lafferty v. Third Ave. R. Co., 176 N. Y. 594. 8
Layton v. Missouri, 187 U. S. —..... 5
Lee v. Railway Co., 193 Fed. 685..... 36
Loeb v. Columbia Twp., 170 U. S. 472.... 5
Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685..... 25
Martin v. Marks, 97 U. S. 345 26
McChesney v. Railway Co., 197 Fed. 85.... 36
Mellon v. Great Northern R. Co., 116 Minn. 449, Ann. Cas. 1913 B., p. 845.....33-34
Mich. C. R. Co. v. Vreeland, 227 U. S. 59, Law Ed. 417..... 39
Michigan Sugar Co. v. Dix, 185 U. S. 112.. 5

PAGE

Mondou v. N. Y., N. H. & H. R. Co., 223 U. S. 1, 56 Law Ed. 327 35
Mutual Life Ins. Co. of N. Y. v. McGrew, 188 U. S. 308 4
N. C. Ry. Co. v. Zachary, 232 U. S. 248 20
National Foundry & Pipe Works v. Oconto City Water Supply Co., 183 U. S. 216 26
N. Y., N. H. & H. R. Co. v. Vizvari, 126 C. C. A. 632, 210 Fed. 118 29
Norfolk & W. R. Co. v. Earnest, 229 U. S. 114 ..... 5, 27
Okla. City v. Reed, 17 Okla. 518, 33 L. R. A. (N. S.) 1205 33
Over v. Schiffling, (Ind.) 26 N. E. 91 9-10
Pennock v. Dialogue, 2 Pet. (U. S.) 1, 15 ... 21
Phelps v. Mayer, 15 How. 160 21
Railway Co. v. Hendricks, 48 Ark. 177 9
Rapalje's & Mack's Digest, Vol. 3, Nos. 75-76, page 281 31-32
Renauld v. Abbott, 116 U. S. 277 25
Roberts Injuries, Interstate Employees, Sec. 131, p. 239 ..... 24, 28
Roff v. Summit Lumber Co., 119 La. 577 .. 32
Root v. Incorporated Village of Monroeville, 10 Ohio Cir. Ct. R. 617 9
Rosenberg, et al. v. Shehan, et al., (Wis.) 133 N. W. 645 10
Sanford Jacobi v. State of Oklahoma, 187 U. S. 133 7
Scranton v. Wheeler, 179 U. S. 141 25
Seaboard Air Line Ry. Co. v. Duvall, 225 U. S. 477 6-7-24
Shewalter v. Bergman, (Ind.) 28 N. E. 686 9
Sissel v. St. Louis, etc., R. Co., 214 Mo. 515, 15 Am. & Eng. Ann. Cas. 433, (Note.) 34

PAGE

Sohn v. Jervis, 101 Ind. 578 9
Spies v. Illinois, 123 U. S. 131 4-5
Spottswood v. Weir, et al., (Cal.) 22 Pac. 289. 10
Stickney v. Hughes, 12 Wyo. 397, 75 P. 945, 79 P. 922 9
St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 291 ..... 19-20, 24
Strauser v. Railway Co., 193 Fed. 293 36
Strickland v. Louisiana Ry. & N. Co., 134 La. 239. 40
Succession of Hasling, 106 La. 553 22
Symonds v. Ry. Co., 192 Fed. 353 36
Taylor v. E. C. Palmer & Co., 124 La. 531 .. 39
Thomp. Trials 678 8
Thornton's Federal Employers' Liability Act (3d Ed.), Sec. 209, p. 311 30
Toledo, St. Louis & Western R. Co. v. Kountz, 168 Fed. 832, 840, 94 C. C. A. 244. 27
U. S. Comp. Stat. 1901, p. 575 19-20
Van Brimmer v. Texas Railroad Co., 190 Fed. 394. 35
Vurpittal, et al., v. Zehner, et al., (Ind.) 28 N. E. 556 9
Wash. & Georgetown R. R. Co. v. Gladmon, 82 U. S. 401 34
Williams v. Norris, 12 Wheat. 117 26
Wimbish v. Hamilton, 47 A. 251 22
Yoder v. Reynolds, 28 Mont. 183, 72 Pac. 417. 8

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BRIEF OF COUNSEL FOR APPELLEE, AND DEFENDANT IN ERROR, MRS. NORA M. JONES, ADMINISTRATRIX.

We have set forth in the following pages of this brief the several assignments of error set up by the plaintiff in error, and to each assignment of error we have given reasons and authority which we submit shows that the writ sued out in this cause was manifestly for the purpose of delay.

Assignment of Error No. 1:

> **"The court erred in holding that while evidence of contributory negligence on the part of the deceased was admissible to mitigate the amount of the damages to be awarded by the jury, under the Act of Congress known as the Employers' Liability Act, that yet in order that such evidence might be admitted that it should be offered for that specific purpose and not tendered generally, contrary to said Act of Congress."**

On the trial of the case the fireman on the passenger train, Elmer Wood, was asked by counsel for plaintiff in error this question:

"Q. You did not have the train under control then?

Counsel for plaintiff (now defendant in error) objects to any evidence as to contributory negligence, as same is not alleged.

Objection sustained by the court.

To which ruling of the court counsel for defendant (now plaintiff in error) excepts and asks that this note stand in lieu of a formal bill of exception." (Tr. 25.)

Counsel for plaintiff in error in the trial court contented themselves with merely reserving a bill of exceptions, generally, to the ruling of the trial judge.

The counsel for plaintiff in error did not direct the attention of the trial judge to any specific reasons for the admission of the evidence sought by the question asked.

When objection was interposed by counsel for defendant in error, there was no attempt made by

the counsel for plaintiff in error to show the evidence was admissible.

In the trial of cases, under the Louisiana practice, such general objections are often made to evidence, and are passed upon at once by the trial judge, with a reservation of a bill of exceptions by the aggrieved counsel noted by the court stenographer in the notes of evidence, and the trial proceeds.

Such incidents are numerously recorded during each trial in the notes of the court stenographer.

Unless the attention of the trial judge is called to a specific objection or assignment of error, little or no attention is paid to these general objections.

The Louisiana Supreme Court in the case of *Covington* v. *Roberson*, 111 La. 338, said:

> "This case is submitted to us by defendant without any complaint as to the instructions which were given by the court to the jury, and the charge itself is not in the record. As has been usual since the passage of the statute allowing objections to testimony to be noted by the clerk or stenographer in the note of evidence to stand in lieu of a formal bill of exceptions, a great many such objections were made on both sides, but none have been particularly called to our attention. We are substantially left to decide the issues upon the weight and sufficiency of evidence, and through the application by ourselves thereto of general *principles* of law. * * *"

The Louisiana Supreme Court in its opinion refusing the application for a rehearing in the instant case said:

"The evidence was therefore offered in support of the defense set up in the pleading, and, so far as the record shows, with no restriction as to its intended effect, and, as so offered, was properly excluded."

"The rule that the objection should be specific has no application, however, where a general objection is sustained; in that case, the party against whom the ruling was made cannot urge that the objection was too general. And when the offer of testimony includes that which is admissible with that which is not, and the competent and incompetent are blended together, it is not the duty of the court to separate the legal from the illegal, but the whole may be rejected when objection is made."

Jones Com. on Ev., Sec. 894, Vol. 5, p. 377 (Blue Book).

In *Mutual Life Ins. Co. of N. Y.* v. *McGrew*, 188 U. S. 308, 47 Law Ed. 484, the court said:

"Our jurisdiction of this writ of error is asserted under the third of the classes of cases enumerated in Section 709 (U. S. Comp. Stat. 1901, p. 575), and it is thoroughly settled that in order to maintain it the right, title, privilege or immunity relied on must not be specially set up or claimed, but at the proper time and in the proper way. The proper time is in the trial court whenever that is required by the state practice, in accordance with which the highest court of a state will not revise the judgment of the court below on questions not therein raised. *Spies*

v. *Illinois*, 123 U. S. 131; *Jacobi* v. *Alabama*, 187 U. S. 133; *Layton* v. *Missouri*, 187 U. S."

"The proper way is by pleading, motion, exception, or other action, part, or being made part, of the record showing that the claim was presented to the court. *Loeb* v. *Columbia Twp.*, 179 U. S. 472. * * *"

"The assertion of the right must be made unmistakably, and not left to mere inference. *F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 648."

See *Michigan Sugar Co.* v. *Dix*, 185 U. S. 112:

"Averments of a federal question to give jurisdiction to this court to review a state judgment must be so distinct and positive as to place it beyond question that the party bringing the case here from the state court intended to assert a federal right."

F. G. Oxley State Co. v. *Butler County*, 166 U. S. 648, 41 Law Ed. 1149.

"Excepting generally to an entire instruction which embodies several propositions of law, to some of which no objection properly can be taken, does not entitle the exceptor to take advantage of a mistake or error in some single or minor proposition therein."

Norfolk & W. R. Co. v. *Earnest*, 229 U. S. 114, 57 Law Ed. 1096.

"Questions not properly presented by the record, and not resulting by necessary intendment therefrom, will not be reviewed."

Citizens Sav. Bank v. *Owensboro,* 173 U. S. 636, 43 Law Ed. 840.

"* * * It is essential that the record should disclose not only that the alleged right, privilege or immunity was specially set up and claimed in the court below, but that the decision of that court was against the right so set up or claimed."

Clark v. *Commonwealth of Penn.*, 128 U. S. 395.

In *Seaboard A. L. R. Co.* v. *Duvall,* 225 U. S. 488, 56 Law Ed. 1176, the court said:

"* * * In any event the exception did not raise any specific question as to the proper construction of the Act under which this action had been brought."

The syllabus of the case of *Seaboard Air Line Ry. Co.* v. *Duvall,* 225 U. S. 477, 56 Law Ed. 1171, reads:

"To sustain a writ of error from the Federal Supreme Court to review a judgment of the highest court of a state on the ground that there was set up and denied a right privilege or immunity claimed under a federal statute, it must appear from the record that there was necessarily present a definite issue as to the correct construction of the Act so directly involved that the state court could not have

given the judgment it did without deciding against the contention of the plaintiff in error."

"Where no sufficient exception is taken to a ruling of the court, it will not be passed upon."

Benson v. *United States*, 146 U. S. 325, 36 Law Ed. 991.

In *Seaboard A. L. R. Co.* v. *Duvall*, 225 U. S. 477, 56 Law Ed. 1171, the court in its opinion says:

"Not one of the requests asks any definite construction of any part of the Employers' Liability Act, or indeed, contains any reference whatever to the Act."

"A claim that the admission in evidence of the previous testimony of an absent witness was in violation of the 14th amendment to the Federal Constitution was not specifically set up at the proper time and in the proper way to confer jurisdiction on the Supreme Court of the United States to review the judgment of the highest court of a state, by an assignment of error in that court, which was not considered by it presumably because no such question had been raised in the trial court."

Sanford Jacobi v. *State of Alabama*, 187 U. S. 133, 47 Law Ed. 106.

"So long, then, as the offer included evidence incompetent, coupled with that which may have been competent, the court commit-

ted no error in excluding the offer in its entirety. It was not the duty of the court to separate the competent from the incompetent matter, and admit the one and exclude the other. It properly passed upon the offer as made, and was not required to do for counsel that which he should have done for himself. *Yoder* v. *Reynolds*, 28 Mont. 183, 72 Pac. 417; *Clark* v. *Ryan*, 95 Ala. 406, 11 So. 22; *First Nat. Bk.* v. *North*, 2 S. D. 480, 51 N. W. 96; Thomp. Trials 678."

Farleigh v. *Kelley*, 28 Mont. 421, 63 L. R. A. 325.

"Defendant should have requested an instruction telling the jury not to consider certain evidence offered on the issue of damages: merely excepting to the court's allowing them to consider it was not sufficient."

Lafferty v. *Third Ave. R. Co.*, 176 N. Y. 594, 68 N. E. 1118.

"It is not error to exclude evidence, admissible for one purpose, when offered for another specific purpose for which it is admissible."

Jeffersonville, M. & I. R. Co. v. *Riley*, 39 Ind. 568.

Hart v. *Brierley*, 189 Mass. 598, 76 N. E. 286.

Hamburg v. *St. Paul F. & M. Ins. Co.*, 68 Minn. 335, 71 N. W. 388.

Howard v. *Vaughan-Moning Shoe Co.*, 82 Mo. App. 405.

Root v. *Incorporated Village of Monroeville,* 10 Ohio Cir. Ct. R. 617.
Stickney v. *Hughes,* 12 Wyo. 397, 75 P. 945, 79 P. 922.

"And if a party mingles competent and incompetent testimony, proposing it all together, the court will not be required to separate the good from the bad, but may reject the entire offer. *Cuthrell* v. *Cuthrell,* 101 Ind. 375; *Sohn* v. *Jervis,* 101 Ind. 578; *City of Terre Haute* v. *Hudnut,* 112 Ind. 542."

Vurpittal et al. v. *Zehner et al.* (Ind.), 28 N. E. 556.
Railway Co. v. *Hendricks,* 48 Ark. 177, 2 S. W. 783.
Shewalter v. *Bergman* (Ind.), 28 N. E. 686.

"When admissible evidence is intermingled with that which is inadmissible, it is not error to exclude the whole."

Cole v. *Horton* (Tex.), 61 S. W. 503.

"Where a tender of evidence is made to prove certain facts, some of which are admissible and others inadmissible, the offer is properly rejected as a whole."

First Nat. Bk. v. *North* (S. D.), 51 N. W. 96.

"An objection is properly sustained to an offer to prove that the witness told defendant certain facts, the communication of some of

which was incompetent, it being the duty of counsel, and not of the court, to separate the competent from the incompetent."

Over v. *Schiffling* (Ind.), 26 N. E. 91.

"The rejection of evidence on a general objection will not call for reversal, where the evidence was objectionable on any specific ground, though the trial court may as against a general objection receive evidence competent as against a general objection, though objectionable as against a specific objection."

Rosenberg et al. v. *Sheahan et al.* (Wis.), 133 N. W. 645.
Clark v. *Ryan* (Ala.), 11 So. 22.

"Generally, in order to predicate error on the overruling of an objection to testimony, specific ground of objection must have been brought to the attention of the trial court prior to the ruling. But, where a general objection to evidence is sustained, the party against whom the ruling was made cannot urge as a ground of reversal that the objection was not specific."

Hurlbut v. *Hall* (Neb.), 58 N. W. 538.
Int. Harvester Co. v. *McKeever*, 109 N. W. 642.

"While the trial court was not bound to seek grounds for excluding evidence upon a general objection thereto, if it did so, and

found a valid objection, the person offering it cannot complain."

Adams v. *Southern Ry. Co.* (Ala.), 50 So. Rep. 987.

"If the exclusion of certain evidence is proper on any ground, the cause will not be reversed because the objection to it was not sufficiently definite, unless the objection not urged might have been obviated."

Spottswood v. *Weir et al.* (Cal.), 22 Pac. 289.

Assignment of Error No. 2:

"The court erred in excluding evidence of the contributory negligence of the deceased tendered by the defendant because it was not admissible generally, under the Act of Congress known as the Employers' Liability Act, and when offered was not restricted by defendant then and there for the purpose of mitigating the amount of damages to be awarded, contrary to said Act of Congress."

The established rule of the federal courts is that contributory negligence to defeat recovery or to reduce recovery must directly and proximately contribute to the injury.

On the question of negligence the Louisiana Supreme Court in the instant case shows how frivolous is the contention of the plaintiff in error under this assignment of error, for it said:

"In this case, however, it cannot be seriously contended that the engineer on the passenger train could have avoided the collision, or

> that there was any negligence whatever on his part. The fireman testified, and it was not contradicted, that the train had slowed down and was under control."

As the Supreme Court of the United States upon a writ of error will not make inquiry whether there was error below in dealing with questions of fact, the statement of fact above excerpted must be accepted as true.

> "Only questions of law apparent on the record can be considered by the Supreme Court of the United States on a writ of error, and there can be no inquiry whether there was error below in dealing with questions of fact."
>
> *Behn M. & Co.* v. *Campbell*, 205 U. S. 403. 51 Law Ed. 857.

The bill of exceptions reserved by the plaintiff in error does not disclose that any alleged right, privilege or immunity, or federal question was set up in the trial court, nor that the decision of the court was against any such contention.

We reproduce the question asked by the counsel for plaintiff in error and the bill of exception reserved by such counsel to the ruling of the trial judge in sustaining an objection made by counsel for defendant in error:

> "Q. You did not have the train under control, then?
>
> Counsel for plaintiff objects to any evidence as to contributory negligence, as same is not alleged.
>
> Objection sustained by the court.

> "To which ruling of the court counsel for defendant excepts and asks that this note stand in lieu of a formal bill of exceptions." (Tr. 25.)

The Louisiana Supreme Court in its decision of the instant case said:

> "The plaintiff charges negligence on the part of the defendant Company and its employees in that the runaway car was known by them to be out of repair and not equipped with the safety appliances required by law and necessary to control it. * * *"

In the court's recital of the facts of the case it referred to the runaway car as follows:

> "This Rock Island car was tagged for repairs: 'Draft bolts and draft timbers spread. End knocked out.' It had to be taken to the transfer track and unloaded, in order to be repaired. Hence it seems that it was necessary to put the Rock Island car at the north end of the four empties and have the switch engine at the opposite end of them. The engineer pulled the Rock Island car out of the repair switch, backed it up to the four empties, and, believing it had coupled automatically, ordered the brakeman to put a chock under its wheels, and apply the hand brakes. Then he took the engine back into the repair track, ordered the switchman to remove the chock, release the hand brakes, and let the five cars roll down past the engine. The testimony of the switchman furnishes a graphic description of the operations and the resulting runaway. * * *"

The court in stating its conclusion upon the evidence relative to the defective coupler and brake said:

> "The only evidence offered by the defendant, besides that elicited on cross-examination, was the testimony of the switchman who had climbed upon the runaway car and tried to stop it. After he had testified as a witness for the plaintiff, he was recalled by the defendant's counsel to prove that, when the car got away it was being taken from the repair track to the transfer track to be there unloaded and returned to the repair track to be repaired. He also testified that the car seemed to couple when it was butted against the four empties, and the brakes seemed to hold. It appears, however, that this witness was not a mechanic; and in view of the fact that the wheels of this car had to be chocked when it was supposed to be coupled to four other cars with brakes on, and in view of the proof that the coupling and brakes both failed to work, we do not think it has been proven that the defects in the car did not affect its couplings or brakes. It is highly improbable that the defects in the car and the failure of its coupling and brakes to be any service were mere coincidences."

The "Safety Appliance Act" was violated by the movement of a car with defective brakes and coupler.

Oneal, a switchman in the employ of the defendant Railroad testified:

> "Q. Mr. Oneal, what was the matter with this car? A. The brakes would not apply.
> Q. Brakes would not apply? A. No, sir. (Tr. 30.)

Q. The Rock Island car was the car on the north end? A. Yes, sir, and I hollered to Andrews—I says, 'Dick, the cars have separated.' He says, 'Get down and try to check it up.' We had then about five or six hundred feet from there to the old street car crossing and I ran along on the ground and caught this car, expecting to stop it. I got on there then and it was going down about a two per cent grade and the brakes did not seem to apply. The fire seemed to fly from the wheels." * * * (Tr. 31.)

E. M. Carlton, switch engineer for the defendant Railroad at the time of the accident and also at the time of the trial, testified:

"Q. If you turn a freight car loose, and it is running of its own momentum, don't they stop them with the hand brake? A. Yes, sir.

Q. If the brakes are in good order they would stop a car? A. Yes, sir." (Tr. 38-39.)

On page 14 of the transcript there is a letter filed in evidence over the signature of G. R. Parish, that admits on the part of the defendant Railroad its negligence as to the defective brake. It reads as follows:

"Shops, Jan. 10, 1912.

Mr. R. D. Andrews,
Foreman, Shops. File 124.

Dear Sir:

Referring to accident train No. 3, just south Cross Lake bridge, night of November 6th.

A reprimand has been placed against your record for responsibility and failure to be a brake on car that broke off, which would have placed you in a better position to take care of the situation, and possibly in position to have overcome this trouble.

Yours truly,

C. R. PARISH,
G. Y. M."

The evidence pertinent to this assignment of error is undisputed that the brake on the car would not perform its function. Again from the evidence the Supreme Court of Louisiana held that the plaintiff in error, the Kansas City Southern Railway Company, had failed to overcome the evidence in the record to the effect that both the brake and the coupler on the runaway car were defective.

The defenses of assumption of risk and contributory negligence are not available to a common carrier, if such common carrier has violated any statute enacted for the safety of employees, and such violation has contributed to the death or injury of such employee.

The Safety Appliance Act has an important bearing upon the Employers' Liability Act, when its provisions are violated by a common carrier, and such violation contributes to the injury or death of the employee.

Under such circumstances the defenses of contributory negligence in mitigation of damages, and the defense of assumption of risk are denied the offending carrier.

The Federal Employers' Liability Act provides:

> "SECTION 3: In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.
>
> SECTION 4: In any action brought against any common carrier under or by virtue of any of the provisions of this Act, to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Section 2 of the Federal Safety Appliance Act provides:

> "On and after January 1, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling auto-

matically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The amendment of 1910 to Federal Safety Appliance Act of 1893, Section 2, reads:

"* * * All cars must be equipped with secure sill steps and efficient hand brakes * * *."

The Supreme Court of Louisiana thus states and answers the contention of the plaintiff in error under this assignment of errors.

On cross-examination of the fireman of the engine on the passenger train, the defendant's counsel asked him:

"'You did not have the passenger train under control?'"

"To which the plaintiff's counsel objected on the ground that the defendant had not alleged that there had been contributory negligence on the part of the engineer. The objection was sustained, and, on plaintiff's counsel's request, it was ordered that it should apply to all such evidence."

"The defendant's counsel reserved a bill of exceptions, and insists that there was error in the ruling."

"Section 3 of the Employers' Liability Act provides (then follows the section quoted in full)."

"The plea of contributory negligence, therefore, has been abolished by the Federal statute, as a defense. But counsel for the defendant contend that contributory negligence may be shown without pleading it, in

mitigation of the damage, on the theory that any facts, not alleged by the defendant, may be proven to show less damages than are claimed by the plaintiff.

This doctrine, supported by decisions in other jurisdictions, has no application to this case * * *. In this case, however, it cannot be seriously contended that the engineer on the passenger train could have avoided the collision, or that there was any negligence whatever on his part. The fireman testified, and it was not contradicted, that the train had slowed down and was under control."

We submit that the Louisiana Supreme Court found from its review of the evidence in this case that the Federal Safety Appliance Act had been violated. That both the coupler and brake on the runaway car were defective, and that under the Federal Employers' Liability Act, under which this suit was brought, the defense of contributory negligence was not available to the plaintiff in error, the Kansas City Southern Railway Company.

As the Honorable Supreme Court of the United States will not review the findings of the Supreme Court of Louisiana on mere questions of fact, where the consideration of such facts have nothing to do with any Federal question, we submit the Court is without jurisdiction to further consider the contention made by the plaintiff in error under this assignment of error.

"But we have not the power to correct mere errors in the trials in state courts,

although affirmed by the highest state courts. This court is not a general court of appeals, with the general right to review the decisions of state courts. We may only inquire whether there has been error committed in the decision of those Federal questions which are set forth in §709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), * * *."

St. Louis, I. M. & S. R. Co. v. *Taylor*, 210 U. S. 291, 52 Law 1066.

"The evidence will be analyzed by the Federal Supreme Court on a writ of error to a state court to the extent necessary to give the plaintiff in error the benefit of its asserted Federal right."

N. C. Ry. Co. v. *Zachary*, 232 U. S. 248.

Assignment of Error No. 3:

"The court erred in excluding evidence of the contributory negligence of the deceased which it held was admissible for the purpose of mitigating the damages to be awarded by holding that it must be restricted to that purpose and so tendered by the defendant, for the reason that under the Employers' Liability Act of Congress such evidence is admissible to mitigate the damages to be awarded, and being so admissible it was the duty of the trial judge to instruct the jury that it should be considered by them in fixing the amount of damages to be awarded and should not be considered in determining the liability of the defendant, and it was the duty of defendant under said Act of Congress to specially limit the purpose or effect of such evidence at the time it was tendered, such limitation being fixed in the Act itself."

This assignment of error, we submit, is frivolous. The charge of the trial judge to the jury was evidently satisfactory to the counsel for the plaintiff in error, for its astute counsel took no bills of exception to the charge.

The Court will assume that the trial judge correctly charged the law to the jury in the absence of the charge from the record, and without any bills of exception having been taken to the charge.

> "If either party deems any point presented by the evidence to be omitted in the charge, it is competent for such party to require an opinion from the court upon that point; if he does not, it is a waiver of it."
>
> *Pennock* v. *Dialogue*, 2 Pet. (U. S.) 1, 15, 7 Law Ed. 327.

> "Errors not excepted to on trial will not be considered on appeal."
>
> *Hanna* v. *Maas*, 122 U. S. 24, 30 Law Ed. 1117.

> "The power of this court is confined to exceptions actually taken at the trial. Objection must be made and exception taken before the verdict."
>
> *Phelps* v. *Mayer*, 15 How. 160, 14 Law Ed. 643.

> "Exceptions to instructions must be brought to the attention of the court before the retirement of the jury, so as to enable

the judge to correct error, if there be any, in his instructions to them."

Hickory v. *United States,* 151 U. S. 303, 38 Law Ed. 170.

In *Doe* v. *Watson,* 8 Howard, 12 Law Ed. 1076, the court said:

"In the argument here, the counsel for the plaintiff asks the reversal of the judgment on the ground that the instruction was against the right of the lessors, or any part of them, to recover, although proved to be the heirs at law of John and Sarah Parrock. The attention of the Circuit Court was not drawn to this point, no instruction was asked in regard to it, and it cannot now be made. * * *"

The Supreme Court of Louisiana in the case of *Succession of Hasling,* 106 La. 553, said:

"* * * But if he expects, upon the appeal, to rely upon a special defense, he must have it appear upon the record. * * *"

In the case of *Wimbish* v. *Hamilton,* 47 A. 251, the court said:

"* * * As a matter of course the refusal to charge all of the instructions carried with it a refusal to charge any one of them, but if plaintiff had reason to complain of the refusal to give one of the special charges asked, he should have made such special charge the subject of a special tender of it, and reserved a separate bill."

The decision in *Jones* v. *Kansas City Southern Ry. Co.*, 137 La. —, was handed down on April 12, 1915. The defendant railway company applied for a rehearing, which was refused on May 10, 1915.

The Louisiana Supreme Court in refusing the rehearing thus states the contention of the defendant railway company:

> "Defendant's counsel contend that evidence of contributory negligence, on the part of the decedent, though not pleaded, and inadmissible to defeat recovery, should have been admitted for the mitigation of the damages claimed by the plaintiff; and, upon reconsideration, we are inclined to the opinion that it should have been admitted, if offered for that purpose, but it was not so offered.
>
> The record showing the following, upon the cross-examination, by defendant's counsel, of the fireman of the passenger train, to-wit:
>
> 'Q. You did not have the train under control, then?
>
> (Counsel for plaintiff objects to any evidence as to contributory negligence as same is not alleged. Objection sustained by the court. To which ruling of the court counsel for defendant excepts and asks that this note stand in lieu of formal bill of exceptions. Counsel for plaintiff asks that this objection and ruling and bill of exception be made general, to apply to all such evidence; and it is so ordered.)'
>
> The evidence was therefore offered in support of the defense set up in the pleading, and, so far as the record shows, with no restriction as to its intended effect, and, as so offered, was properly excluded."

We submit that the contention of the plaintiff in error does not raise any specific question as to the proper construction of the Federal Employers' Liability Act, under which the instant suit was brought, or is any Federal question involved, but merely a matter of pleading and practice under the laws of the state of Louisiana.

We submit the Honorable Supreme Court of the United States is therefore without jurisdiction as to this assignment of error.

> "In order to sustain a writ of error from the Supreme Court of the United States to the highest court of a state in any action under the Federal Employers' Liability Act, it must appear, in order to give the United States Supreme Court jurisdiction, that a right under the Constitution or laws of the United States was specially set up by the plaintiff in error in the state court and denied by the highest court of the state. *It must also appear from the record that there was necessarily presented in the state court a definite issue as to the correct construction of the Federal Employers' Liability Act so directly involved that the state court could not have given the judgment it did without deciding the question against the contention of the plaintiff in error.*"
>
> Roberts Injuries, Interstate Employees, §131, p. 239, citing the following authorities:
>
> *St. Louis, I. M. & S. R. Co.* v. *Taylor,* 210 U. S. 281, 52 Law Ed. 1061.
>
> *Seaboard A. L. Ry.* v. *Duvall,* 225 U. S. 477, 56 Law Ed. 1171.

"Errors assigned upon the record, relating to matters of pleading and practice under the laws of the state, involve no Federal question."

Buena Vista County v. *Iowa Falls, etc., R. R. Co.*, 112 U. S. 165, 28 Law Ed. 681.

"In 1908, after the case had been twice tried without any decisive result, the plaintiff sought to amend his petition by charging that the cars were used in moving interstate traffic, but the application was denied, the period of limitation having expired in the meantime. Error is assigned upon this ruling; but as it involved only a question of pleading and practice under the laws of the state, it is not subject to review by us. *Texas & N. O. R. Co.* v. *Miller*, 221 U. S. 408, 416, 55 Law Ed. 789, 31 Sup. Ct. Rep. 534."

Brinkmeier v. *Missouri P. R. Co.*, 224 U. S. 268, 56 Law Ed. 758.

Questions merely of state practice are not reviewable on writ of error from the Federal Supreme Court to a state court.

Buena Vista County v. *Iowa Falls & S. C. R. Co.*, 112 U. S. 165, 28 Law Ed. 480.

Renaud v. *Abbott*, 116 U. S. 277, 29 Law Ed. 629.

Long Island Water Supply Co. v. *Brooklyn*, 166 U. S. 685, 41 Law Ed. 1165.

Scranton v. *Wheeler*, 179 U. S. 141, 45 Law Ed. 126.

Such are questions of evidence.

Central P. R. Co. v. *California,* 162 U. S. 91, 40 Law Ed. 903.
Martin v. *Marks,* 97 U. S. 345, 24 Law Ed. 940.
Williams v. *Norris,* 12 Wheat. 117, 6 Law Ed. 571.

Questions of pleading, when considered solely as questions of state practice, are also outside the scope of such review.

National Foundry & Pipe Works v. *Oconto City Water Supply Co.,* 183 U. S. 216, 46 Law Ed. 157.
Grand Rapides & I. R. Co. v. *Butler,* 159 U. S. 87, 40 Law Ed. 85.
Johnson v. *Drew,* 171 U. S. 93, 43 Law Ed. 88.

In *Illinois Cent. R. Co.* v. *Porter,* 207 F. 316, the Circuit Court of Appeals, Sixth Circuit, said:

> "The charge of the jury is criticised as limiting the reduction of damages attributable to the negligence of the deceased to such negligence as proximately contributed to the injury. It is said that under the practice in Tennessee in cases where the contributory negligence does not defeat recovery, but merely reduces damages, any negligence of the person injured whichever remotely contributes to the injury is to be taken into account. We need not stop to consider the scope of the Tennessee decisions invoked. They are not binding upon our construction of this Federal statute. It is the established rule in the Federal courts that contributory

negligence, to defeat recovery, must directly and proximately contribute to the injury. We content ourselves with calling attention to the decisions of this court in *Coney Island* v. *Dennan,* 149 Fed. 687, 693, 79 C. C. A. 375, and *Toledo, St. Louis & Western R. Co.* v. *Kountz,* 168 Fed. 832, 840, 94 C. C. A. 244. We see no logical reason for a different view under the Employers' Liability Act. Under that Act the negligence of the employee must, in order to reduce recovery, be 'casual.' The purpose of the rule of damages provided is, as said by Mr. Justice Van Devanter, in the recent case of *Norfolk & Western Ry. Co.* v. *Earnest,* 229 U. S. 114, 57 Law Ed. 1096: 'To abrogate the common-law rule completely exonerating the carrier from liability in such a case, and substitute a new rule confining the exoneration to a proportionate part of the damage corresponding to the amount of negligence attributable to the employee.'

In the Earnest case it was pointed out that a comparison of the employee's negligence should be made, not with that of the defendant, but with 'the entire negligence attributable to both.' * * *"

"The question whether contributory negligence of the injured employee in order to be available to the defendant must be pleaded is to be determined by the laws of the state where the action is pending, for such a matter relates to procedure and the laws of the state govern as to procedure even in actions under the Federal Employers' Liability Act. The general rule is that unless the plaintiff's contributory negligence appears as a matter

of law by his proof the plea of contributory negligence must be specially pleaded; though a few courts hold to the contrary. * * *"

Roberts Injuries, Interstate Employees, §119, p. 226.

"In an action in a Federal court, brought in a state where the common law system of pleading prevails, contributory negligence, being in those courts a matter of affirmative defense, must be pleaded."

Clark v. *Canadian Pac. Ry. Co.*, 69 Fed. 543.

Evans v. *Lake Erie & W. R. Co.*, 78 Fed. 782.

"The adjudications of the Supreme Court, to the effect that the contributory negligence of a plaintiff is a matter of defense, and the burden of proof is upon the defendant, do not touch the question of pleading which arises here. That question is controlled by the rules which obtain in the state in which the action is tried, and in some of the states, under the code system of pleadings which prevails, the defendant may be required to specifically allege the defense in cases in which the complaint does not allege that the plaintiff was free from negligence on his part. As in Vermont the rules of pleading which obtain are those of the common law, and under these rules a defendant, in an action upon a case, is permitted, under a general traverse, to show that the plaintiff's negligence contributed to the injury, we are unable to doubt that the defendant in the

present case was entitled to avail himself of the defense, and that the instruction to the jury which is complained of by the assignments of error was erroneous."

Canadian Pac. Ry. Co. v. *Clark*, 73 Fed. 81, C. C. A. 447.

A case arising under the Employers' Liability Act was before the court in the case *New York, N. H. & H. R. Co.* v. *Vizvari*, 126 C. C. A. 632, 210 Fed. 118, in which the court said:

"* * * The defendant did not plead assumption of risk, but it relied upon it at the trial, and the court left it to the jury to say whether the plaintiff assumed the risk of the use of the chisel. In considering the necessity and sufficiency of the pleas of assumed risk, it is necessary to observe that a difference exists between the assumption of the 'ordinary' risks of the employment and the assumption of 'extraordinary' risks. If the risk is of the former kind, it is not incumbent on the defendant to plead it; but, if the risk is of the latter kind, the rule in some jurisdictions is that, if the defendant desires to rely upon it as a defense, he must specially plead it. See Labatt on Master & Servant, Vol. 4, §1636; 3 Bailey, Personal Injuries, 2d Ed., §851. But in this court the question is controlled by the rules which obtain in the state in which the action is tried. *Canadian P. R. Co.* v. *Clark*, 20 C. C. A. 447, 73 Fed. 76."

The new work of "Thornton's Federal Employers' Liability Act" (3d Ed.) thus states the law:

> "If the practice in the local state courts requires a particular defense to be presented by answer, it must be so presented in an action on the Federal Act. That is true where assumption of risk must be especially pleaded according to the local practice. But if the local practice does not require a plea or answer to raise the question, then in an action under the Federal Act it may be raised without pleading it. If the local practice requires contributory negligence to be pleaded in actions of negligence, then it must be pleaded in an action on the Federal statute, not as a full defense, but a defense as to the amount of damages recoverable, and the defendant, whether pleaded or not, has the burden to show it. * * *"
>
> Thornton's Federal Employers' Liability Act (3d Ed.), §209, page 311.

LAW OF LOUISIANA.

Under the law of Louisiana, contributory negligence must be specially pleaded to be *available* as a defense.

With great respect we submit that the *obiter dictum*, in the refusal by the Louisiana Supreme Court of the rehearing in this case, does not correctly set forth the well recognized jurisprudence of the state of Louisiana. We quote as follows:

> "Defendant's counsel contend that evidence of contributory negligence, on the part of the decedent, though not pleaded, and inadmis-

> sible to defeat recovery, should have been admitted for the mitigation of the damages claimed by the plaintiff; *and upon reconsideration, we are inclined to the opinion that it should have been admitted, if offered for that purpose; but it was not so offered.*"

Justice O'Neill in his dissenting opinion said:

> "I am yet of the opinion that evidence of contributory negligence is not admissible without a plea to that effect * * *."

We cite two very recent cases where the Supreme Court of Louisiana has decided the exact issue, holding that the evidence of contributory negligence is not available without a plea to that effect.

In *Buechner* v. *City of New Orleans*, 112 La. 599, the court said:

> "Our opinion is that contributory negligence must be pleaded by defendant, and, in the absence of such plea, evidence is not admissible to show that plaintiff was guilty of negligence."

Excerpting from the case cited *supra*, the Louisiana Supreme Court thus states the law:

> "The question raised by this bill is one of great importance and the decisions on the subject are confusing, conflicting and unsatisfactory. The weight of the more recent decisions is in favor of the proposition that 'contributory negligence is a matter of defense, and, to be availed of, must be pleaded.' See Rapalje & Mack's Digest, Vol. 3, Nos. 75, 76, page 281; Beach, *infra*.

It has been the uniform jurisprudence of the Supreme Court of the United States that the burden of proof is on defendant to show that the plaintiff was negligent, and that his negligence contributed to the injury. See *Inland & Seaboard Coasting Co.* v. *Tolson,* 139 U. S. 551, 11 Sup. Ct. 653, 35 Law Ed. 270; *Washington & Georgetown R. Co.* v. *Harmon's Adm'r,* 147 U. S. 571, 13 Sup. Ct. 557, 37 Law Ed. 284.

If this be a correct proposition of law, it follows that defendant must plead what he is bound to prove. What a party does not allege he cannot prove. Hennen's Digest, Vol. 2, p. 115, No. 3.

Beach states that the rule adopted by the United States Supreme Court prevails in England, and twenty states of the Union, and that defendant, under this rule, must allege and prove the concurrent default of plaintiff. Cont. Neg., §440-443."

In the case of *Roff* v. *Summit Lumber Co.,* 119 La. 577, the court said:

"Assumption of risk, like the plea of contributory negligence, must be specially urged, and cannot be availed of under the general issue. * * *"

The great weight of opinion supports the rule that the defense of contributory negligence, to be available, must be pleaded.

"It is a general rule that the defense of contributory negligence, to be available, must be pleaded."

Labatt's Master & Servant (2d Ed.), §1635, p. 4986. (Citing numerous authorities.)

> "While it is held in a number of jurisdictions that contributory negligence is available as a defense under the general issues, or general denial, it is held in the majority of jurisdictions where the question has been raised that to be available as a defense, contributory negligence must be specially pleaded, and it has been held that the rule applies, although the complaint alleges that plaintiff was free from fault."
>
> 29 "Cyc." 580-581.

In a comprehensive note to the case of *Okla. City* v. *Reed*, 17 Okla. 518, 33 L. R. A. (N. S.) 1205, the able editors say:

> "It has been held in a number of cases, in jurisdictions where the burden of proving contributory negligence is on the defendant, that if the defense is relied upon, it must be pleaded by the defendant; that it is not available under a general denial. * * *"

In a note to *Mellon* v. *Great Northern R. Co.*, 116 Minn. 449, Ann. Cas. 1913 B., p. 845, the able editor of that recent work says:

> "As to whether contributory negligence must be pleaded in order to be available as a defense, the decisions are conflicting. In many jurisdictions the rule is that contributory negligence must be specially pleaded, while in other jurisdictions such defense is available under the general issue. * * * Most of the recent cases involving the question have been decided in jurisdictions where

> the rule prevails, that contributory negligence is an affirmative defense and must be pleaded specially. * * *"

In a note to *Sissel* v. *St. Louis, etc., R. Co.*, 214 Mo. 515, 15 Am. & Eng. Ann. Cas. 433, the cases are shown which hold the view that contributory negligence must be pleaded, and also the cases holding the other view. The great weight of authority supports the view that contributory negligence to be availed of as a defense must be specially pleaded.

> "In an action to recover for injuries by being run over by a street car, contributory negligence of the person injured is a defense to be proved by the defendant."
>
> *Wash. & Georgetown R. R. Co.* v. *Gladmon*, 82 U. S. 401, 21 Law Ed. 114.
> *Indianapolis & St. L. R. R. Co.* v. *Horst*, 93 U. S. 291, 23 Law Ed. 898.

Assignment of Error No. 4:

> **"The court erred in denying to the defendant the right to remove said cause to the United States District Court for the Western District of Louisiana, for the reason that said suit was of a civil nature wholly between citizens of different states and involved, exclusive of interest and cost, more than three thousand dollars, the right of removal being given to the defendant because of such adverse citizenship by the constitution and laws of the United States and particularly by Section 2 of Act of Congress of March 3d, 1887, and the amendments thereto."**

The Supreme Court of Louisiana in passing on this contention said:

> "Referring to the bill of exceptions taken to the refusal of the judge to order the case removed to the federal court, the defendant's counsel argue that the Act of Congress of April 5, 1910, amending the Employers' Liability Act of 1908, only provides that a cause shall not be removed on the ground solely that a federal question is presented in a suit under the Act of Congress.
>
> They contend that the amending Act was not intended to prevent the removal for a cause that existed before and independent of the Act of Congress of 1908, as when the plaintiff and defendant are domiciled in different states. They cite a decision to that effect by Judge Russell of the United States Circuit Court for the Eastern District of Texas, in the case of *Van Brimmer* v. *Texas Railroad Co.*, 190 Fed. 394. The Act of Congress, however, makes no such exception. It provides that 'No case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.'
>
> This language was recently construed literally by the United States Supreme Court in case of *Mondou* v. *N. Y., N. H. & H. R. Co.*, 223 U. S. 1, 56 Law Ed. 327, where Mr. Justice Van Devanter expressed the opinion:
>
> 'We conclude that rights arising under the Act in question may be enforced, as of right, in the courts of the states, when their jurisdiction, as prescribed by local laws, is adequate to the occasion.'
>
> Since the decision cited by the defendant's counsel was rendered by Judge Russell,

several decisions to the contrary have been rendered by other Circuit Courts of the United States. See *Symonds* v. *Ry. Co.,* 192 Fed. 353; *Strauser* v. *Railway Co.,* 193 Fed. 293; *Lee* v. *Railway Co.,* 193 Fed. 685; *Hulac* v. *C. & N. W. Ry.,* 194 Fed. 747; *McChesney* v. *Railway Co.,* 197 Fed. 85; *De Atley* v. *C. & O. Ry. Co.,* 201 Fed. 591; *Kelley's Adm'r.,* v. *C. & O. Ry.,* 201 Fed. 602.

We conclude that there was no error in refusing to remove the case to the United States District Court."

On June 21, 1915, the Honorable Supreme Court of the United States, in the case of *Kansas City Southern Railway Company,* plaintiff in error, v. *Sam E. Leslie, Adm'r.,* (not yet reported in the reports) set at rest this contention; in the syllabus it said:

"The removal from a state court to a federal court, upon the sole ground of diversity of citizenship, of an action brought under the Federal Employers' Liability Act of April 22, 1908 (35 Sta. at L. 65, Chap. 149, Comp. Sta. 1913, Sec. 8657), as amended by the Act of April 5, 1910 (36 Sta. at L. 291, Chap. 143, Comp. Stat. 1913, Sec. 8662) is prohibited by the provisions both of such amendatory Act and of the Judicial Code, Sec. 28, that no such action brought in any state court of competent jurisdiction shall be removed to any court of the United States."

Assignment of Error No. 5:

> **"The court erred in awarding damages to the administratrix of the deceased without taking into consideration the elements for which damages are awarded under the Act of Congress known as the Employers' Liability Act, approving and awarding her a sum in excess of that which it had allowed to others where the elements of recovery embraced not only loss of support as sued for in this case, but where the elements of recovery also embraced mental anguish, and a recovery for the death of the deceased, and the Supreme Court of the state of Louisiana by failing to give consideration to the elements of damages recoverable under said Act of Congress and by awarding a lump sum to each of the beneficiaries under said Act, dodged the federal question thus presented and decided the same adversely to defendant, contrary to the terms and provisions of said Act of Congress approved April 22d, 1908, amended April 5th, 1910."**

This assignment of error, we submit, is also frivolous. The charge of the law given by the trial judge to the jury will be presumed to have been a correct statement of the law, for there are no bills of exception in the record complaining of any errors in the charge so given.

For the plaintiff in error to now complain of an erroneous apportionment of damages among the beneficiaries, as awarded by the jury, there should of course be bills of exception in the record to show that the law as charged to the jury was erroneous. The record is barren of any such showing.

A reading of the judgment on page 13 of the transcript evidences the fact that the jury took

into consideration the ages of the children (see Tr. 16), and that they apportioned the damages accordingly.

Mrs. Nora M. Jones, the widow, was given five thousand ($5,000.00) dollars; John Edward Jones, the 2-year-old minor child, five thousand ($5,000.00) dollars; Marjorie Jones, 6 years of age, four thousand ($4,000.00) dollars, and Alice Jones, 7 years of age, thirty-five hundred ($3,500.00) dollars.

In *Gulf, C. & St. F. R. Co.* v. *McGinnis,* 228 U. S. 176, 57 Law Ed. 787, the court stated the law to be as follows:

> "The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return. This will, of course, exclude any recovery in behalf of such as show no pecuniary loss."

The amount of damages awarded by verdicts in actions under the Employers' Liability Act does not present a question that the United States Supreme Court will review upon a writ of error.

> "The supposed error most insisted upon is the entering of judgment upon a verdict said to be manifestly excessive. It is admitted that the judge charged the jury correctly, according to the principles established by *Mich. C. R. Co.* v. *Vreeland,* 227 U. S. 59,

> 57 Law Ed. 417, but it is thought to be apparent as a matter of law that the jury found more than the charge allowed. * * * But a case of mere excess upon the evidence is a matter to be dealt with by the trial court. It does not present a question for re-examination here upon a writ of error. * * *"

The trial judge approved the verdict of the jury by signing the judgment, as shown on transcript **page 13.**

This assignment of error sets up that "the Supreme Court of the state of Louisiana erred by failing to give consideration to the elements of damages recoverable under said Act of Congress and by awarding a lump sum to each of the beneficiaries under said Act, dodged the federal question thus presented and decided the same adversely to defendant. * * *"

Answering this harsh criticism of the Supreme Court of Louisiana, we submit that the jury in the trial court fixed the *quantum* of damages to be awarded the several beneficiaries by their verdict, which met the approval of the trial judge. The Supreme Court of Louisiana had nothing to do with the *quantum* of damages so awarded, save to review the same as to whether the awards were excessive or inadequate.

In the case of *Taylor* v. *E. C. Palmer & Co.*, 124 La. 531, the court said:

> "The *quantum* of damages awarded by the jury in a case of personal injury will not be disturbed by the Supreme Court, unless the award be manifestly excessive or inadequate."

As no error was assigned to the charge of the trial judge to the jury, the Supreme Court of Louisiana was only called upon to review the *quantum* of damages awarded.

In the very recent case of *Strickland* v. *Louisiana Ry. & N. Co.,* 134 La. 239, the court said:

> "The verdict of a jury is not to be lightly cast aside unless there is some reason for so doing."

The plaintiff in error makes the bald assertion that the Supreme Court of Louisiana failed to take into consideration the Employers' Liability Act in approving and awarding damages that embraced not only the elements of loss of support, but also the elements of mental anguish.

The Louisiana Supreme Court, speaking through Chief Justice Monroe, in its opinion refusing a rehearing, said:

> "* * * the present judgment, being governed by the federal statute, allows nothing for any suffering of the deceased or for the mental anguish of the plaintiffs, and though it includes nothing in the way of punitory damages."

This assignment of error is clearly without merit.

We submit that the writ of error sued out in this cause was manifestly for delay, and with great respect we ask the Honorable Supreme Court

of the United States to either dismiss the writ of error herein sued out, or else affirm the judgment of the court below.

Respectfully submitted,

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